United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7257

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

EUGENE S. RAPELYEA,

Plaintiff-Appellant,

No.76-7251

v.

THE NEW YORK STATE SUPREME COURT,
THE NASSAU COUNTY BOARD OF
SUPERVISORS,

Defendant-Appellees,

----------X

BRIEF FOR DEFENDANT-APPELLEE
NASSAU COUNTY BOARD OF SUPERVISORS

JAMES M. CATTERSON, JR.
COUNTY ATTORNEY OF NASSAU COUNTY
NASSAU COUNTY EXECUTIVE BUILDING
WEST STREET,
MINEOLA, NEW YORK

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Natale C. Tedone,
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Matthew Tedone,
Law Clerk, on the Brief.

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Counter-Statement of Facts and Nature of the Case

Plaintiff-Appellant Eugene S. Rapelyea (hereinafter "appellant") commenced this action by Order to Show Cause, Summons and Complaint, dated October 10, 1975. At the time he brought this action, appellant sought to enjoin the placing of two distinct plans of local government upon the ballot in November, 1975 for a popular referendum. Those two plans were: 1) a reapportionment of Nassau County into fifteen legislative districts, with each district to be represented by a county legislator; and 2) retention of the Board of Supervisors and town/and city units, with a modified weighted voting apportioned among the supervisors.

Appellant sought to keep the above plans from reaching the voters because appellant sought to redistrict Nassau County to construct a district composed of Hempstead, Roosevelt, Freeport, Lakeview and Uniondale covering all census tracts that are comprised of a minority population of Black and Spanish speaking residents. (Complaint, ¶.3 through ¶.7; ¶.12 through ¶.18).

The present law suit continued even though the voters of Nassau County, in the November, 1975 referendum chose to retain the Board of Supervisors with weighted voting power as their form of county government. While appellant's complaint centered upon court creation of a legislative district from those census tracts adjacent to each other comprising a minority population, his Brief before this Court deals solely with the constitutionality or unconstitutionality of the modified weighted voting plan.

Appellant commenced this action against defendant-appellee Nassau County Board of Supervisors (hereinafter "Board") one day after an order issued from the New York State Court of Appeals, withdrawing upon consent an appeal by appellant in an action against the Board (Appendix, pg. A-3 attached to Brief herein). The action in the New York State courts, entitled Rapelyea v. Nassau County Board of Supervisors, was predicated upon the same facts and law as the present case, and appellant in the State Court sought precisely the same relief as he seeks in this case.

The Court below (Platt, J.), by Memorandum and Order dated March 31, 1976 dismissed appellant's complaint, stating that appellant's claim is moot (p.3), and

furthermore that the modified weighted voting plan, which was approved by the New York Courts and by the voters of Nassau County, is a constitutional system of local government.

Counter-Questions Presented for Review

1) Whether this appeal is mooted as to both appellees, the Board and New York State Supreme Court?

The Court below found appellant's claim mooted as to the legislative districting plan placed before the electorate of Nassau County in a referendum.

2) Whether the modified weighted voting plan, adopted by the electorate of Nassau County, is constitutional?

The Court below held in the affirmative.

3) Whether this appeal presents a substantial federal question?

The Court below implied in the negative.

4) Whether appellant may bring this collateral attack upon the weighted voting system of government in federal court after he was given a full opportunity to litigate his claim in the State courts?

The Court below found in the affirmative.

POINT I

THE COURT BELOW PROPERLY DISMISSED APPELLANT'S COMPLAINT

It is the Board's contention that appellant's claim has been mooted by the popular referendum in the November, 1975 general election. The Board further contends that the modified weighted voting plan (i.e. the present Board of Supervisors) is constitutional and that in any event the appellant has failed to present a substantial federal question as would warrant him relief by this Court.

(a) Appellant's claim is moot.

It is a foregone conclusion that voter approval of the modified weighted voting plan in the November, 1975 referendum pursuant to Local Law No. 5-1975 (see Exhibit "D" of appellee's moving papers below), whereby the voters of Nassau County approved local government consisting of a Board of Supervisors with only a changed weight in member voting, mooted appellant's attempts to preempt the modified weighted voting plan (Proposition #1 on the ballot) or the legislative districting plan (Local Law No.6-1975, Proposition #2; see Exhibit "E" of appellee's moving papers below) from being placed on the ballot in the November, 1975 election.

The November 1975 referendum as well mooted appellant's attempts in the present proceeding to have this Court carve the County of Nassau into legislative districts so that "census tracts" which appellant alleges to comprise a "Cognizable Racial Element" (Complaint ¶. 3 to ¶.5) may all be subsumed into one legislative district. Rapelyea v. Nassau County Board of Supervisors 81 Misc.2d 59, 367 NYS 2d 1005 (Sup.Ct.Nass.Co.1975), appeal withdrawn by stipulation, dated September 29, 1975, and order withdrawing appeal to Court of Appeals, dated October 9, 1975 (see Appendix pp. A-1, A-2 and A-3 to brief herein).

It is respectfully submitted that, after the decisions of the New York State Courts in Franklin v. Krause 83 Misc.2d 42, aff'd. 49 A.D. 2d 740, aff'd 37 N.Y.2d 814 (1975) (hereinafter "Franklin II") and the culmination of these decisions by the November 1975 referendum, appellant's claims presently before this Court are moot and this Court should decline to hear them at this late date.

(b) The System of government presently in operation in Nassau County is constitutional.

The modified weighted voting plan, which continued the Board of Supervisors mode of local government for

Nassau County and which was approved by the New York Court of Appeals (Franklin II, supra) and by popular referendum, is constitutional and should be upheld by this Court. Franklin v. Krause 32 NY 2d 234, 344 NYS 2d 885, 298 NE2d 68, app. dism. 415 US 904 (1972), (hereinafter "Franklin I"), is conclusive in this regard. In Franklin I, the New York Court of Appeals held the very same modified voting plan as was approved by the Nassau County voters in the November 1975 referendum and which is attacked by appellant, to be constitutional. It is respectfully submitted that this Court adopt the reasoning of Judge Gabrielli in Franklin I.

Voting power deviation under the present plan is 7.3 per cent. Variation which totals 7.3 percent is well within constitutionally permissible limits, and should not be declared unconstitutional. Abate v. Mundt 403 US 182, 29 LEd 2d 399, 91 S.Ct. 1904 (1971) (11.9% variation permissible); Mahon v. Howell 410 US 315, 35 L Ed 2d 320 93 S.Ct. 979 (1973) (16.4% variation permissible); Cohen v. Maloney 410 F.Supp.1147, 1151 at fn.4 (D.Del.1976). This minor (i.e.7.3%) variation in the modified weighted voting plan has a rational basis, and the continued preservation of town and city boundary lines is important for efficient operation of the

Nassau County government.

The voters of Nassau County had a clear choice between dividing their local, county government into fifteen legislative districts or retaining the three town units and two city units into which the County is divided, governed by a Board of Supervisors. The outcome of this referendum showed popular desire to retain the traditional subdivisions, and the Board of Supervisors and this Court should not now interfere and overturn that popular mandate. An instructive passage from Abate v. Mundt, supra states:

> "In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." 403 US 185.

Appellant has failed to cite any cases which have held weighted voting to be ipso facto unconstitutional, because no such cases exist. The voting variations in Nassau County government are well within constitutionally permissible limits, and the weighted voting system should, therefore, be upheld.

(c) There is no substantial Federal question and the Appeal should therefore be dismissed.

This appeal should be dismissed for want of a substantial, federal question. This very modified weighted voting plan which appellant now collaterally attacks has been found constitutional by the highest court in New York State. Franklin I, supra. The United States Supreme Court dismissed the appeal in Franklin I for want of a substantial federal question (415 U.S.904,39 L Ed 2d 461), and this Court should do the same in the case at bar.

POINT II

APPELLANT MAY NOT NOW COLLATERALLY ATTACK THE MODIFIED WEIGHTED VOTING PLAN IN THE FEDERAL COURTS.

Appellant already had his bite at the apple in the state courts and should not now be permitted an identical attack upon an identical modified weighted voting plan against the same board of supervisors. Rapelyea v. Nassau County Board of Supervisors, supra (See Point I (a) of Brief herein).

It should be noted at this point that, although entirely absent from Appellant's Brief, the gravamen of

appellant's complaint in the Court below was to have the Court below create district boundary lines so that those predominantly black sections of Hempstead, Roosevelt, Uniondale, Lakeview and Freeport may all be joined in one "ethnically pure" legislative district (Complaint, ¶.3, ¶.6, ¶.17 and ¶.18). Justice Gibbons' decision in Rapelyea v. Nassau County Board of Supervisors, supra is conclusive as well as poignant:

> "Here, the petitioners, absent any factual showing that the voting power of any minority group has been diluted in violation of the one man, one vote doctrine in any of the existing legislative districts as set up in Plan A or Plan B, seek to have the court carve out an enclave in such manner as would diminish the voting power of those persons residing therein who may be of a different ethnic or racial background than the petitioners.
> This concept is divisive and does violence to a free and democratic form of government, and if permitted to take place, would result in a collection of separate ghettos for each group of different ethnic racial or religious backgrounds. In Ince v. Rockefeller (290 F. Supp 878, 884), the court stated: "Framers of voting districts are required to be color blind. Neither the concept of 'one person, one vote' nor the provisions of the Fourteenth or Fifteenth Amendments guarantee to Negroes or to any other racial or national group the right to concentrated voting power." (81 Misc.2d, at 60)

Justice Gibbons further stated:

> "There is no constitutional obligation cast upon a municipality or other governmental unit to create a legislative district for the accommodation of any ethnic, racial, political or religious group that may reside therein to insure their greater voting power; on the contrary, the law is most diligent to apply the appropriate constitutional safeguards to strike down any such contrivance when it is shown to be established that it was inspired by an effort to dilute or dininish the voting power of any minority groups in such district.
> The court is mindful of and sympathetic with the problems and deprived conditions confronting the minority groups; nevertheless, the court must follow the law, and there are no cases which would authorize the court to set up legislative districts on an ethnic basis." (81 Misc.2d at 61).

Appellant had and utilized a full opportunity to litigate his claims vis-a-vis the legislative reapportionment of Nassau County against the Board in state courts. Appellant unreservedly commenced the same proceeding against the Board in state court, without retaining any right to seek relief in federal district court. He should not now be permitted a second bite at the apple in federal courts. England v. Louisiana Medical Examiners 375 U.S. 411, 419, 11 L Ed 2d 440, 447, 84 S.Ct. 461 (1964).

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

JAMES M. CATTERSON, JR.
County Attorney of Nassau County
Attorney for Appellee Board of Supervisors
Nassau County Executive Bldg.
Mineola, New York 11501
(516) 535-3307

Natale C. Tedone,
Senior Deputy County Attorney,
Of Counsel

Matthew Tedone,
Law Clerk, on the Brief.

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SEP 26 1975

PRATT, CAEMMERER & CAREY
PROFESSIONAL CORPORATION
FILE # 1353-1000

State of New York
Court of Appeals

Joseph W. Bellacosa
Clerk of the Court

COPY

Clerk's Office
Albany 12207

September 24, 1975

Mr. Eugene S. Rapelyea
c/o Carl Strauss, Esq.
1 Old Country Road
Carle Place, New York 11514

Re: Rapelyea v. Nassau County Board of Supervisors

Dear Mr. Rapelyea:

In view of this Court's determination in Franklin v. Krause, decided September 19 (copy enclosed), may I inquire if it is your intention to pursue the appeal you filed in Rapelyea v. Nassau County Board of Supervisors, since you may consider it moot or superceded.

It would be good practice for you to contact Mr. Pratt so that a stipulation of withdrawal of that appeal could be executed and filed with this Court, if you agree and if you intend not to pursue this appeal.

The Court would appreciate a response as soon as practicable.

Very truly yours,

Joseph W. Bellacosa

JWB:im

cc: George C. Pratt, Esq.

A-1

9/29/75
1353-1000

COURT OF APPEALS
STATE OF NEW YORK

- X

EUGENE S. RAPELYEA, :

Petitioner-Appellant, : STIPULATION OF DISCONTINU

- against - : Index No.

THE NASSAU COUNTY BOARD OF SUPERVISORS, :

Respondent-Respondent. :

- X

IT IS HEREBY STIPULATED that the appeal in this matter taken from the order of Honorable David T. Gibbons, Nassau County Supreme Court dated May 14, 1975 be and the same hereby is discontinued and withdrawn, without costs to either party.

Dated: Williston Park, N.Y.
September 29, 1975

Eugene S. Rapelyea
EUGENE S. RAPELYEA, pro se

George C. Pratt
GEORGE C. PRATT
Special Counsel for
Board of Supervisors

A-2

Vol. 7

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Ninth *day of* October *A. D. 197*5.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Eugene S. Rapelyea, &c.,

Appellant,

vs.

The Nassau County Board of Supervisors,

Respondent.

On reading and filing the annexed consent, it is

ORDERED, that the appeal taken by the appellant in the above cause to this Court be and the same hereby is withdrawn.

Joseph W. Bellacosa

Clerk of the Court

A-3

RAPELYEA v. NEW YORK STATE SUPREME COURT AND
NASSAU COUNTY BOARD OF SUPERVISORS

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Helen Pappas, being duly sworn, deposes and says that deponent is over eighteen years of age, not a party to the proceedings herein; that deponent is employed in the Office of the County Attorney of Nassau County; that on the 16th day of November, 1976 deponent served the within Brief upon:

EUGENE S. RAPELYEA, pro se
35 Elizabeth Avenue
Hempstead, N.Y. 11550

JOSEPH HENNENBERRY, Asst.Atty.General
Office of the Attorney General, State of New York
Two World Trade Center
New York, N.Y. 10047

by depositing a true copy of the same securely enclosed in a post paid wrapper in a post office box regularly maintained by the U.S. Government at Nassau County Executive Bldg., Mineola, N.Y. directed to the above at the addresses within the state designated by them for that purpose upon preceding papers.

Helen Pappas

Sworn to before me this 16th day of November, 1976

Helene B. Roche

HELENE B. ROCHE
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-3315060
Qualified in Nassau County
Commission Expires March 30, 1977